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No. 473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FREDERICK F. SINGER, individually and as guardian and parent of MICHAEL SINGER, an infant,

Respondents,

against

ALAN WALKER, doing business under the firm name and style of WALKER'S MINERALS at 799 Lexington Avenue, New York City,

Defendant,

and

ESTWING MANUFACTURING CO. INC., also known as ESTWING MANUFACTURING COMPANY,

Petitioner.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE CONSTITUTIONALITY OF SECTIONS 302 AND 10003 OF THE CIVIL PRACTICE LAW AND RULES OF THE STATE OF NEW YORK WHICH BECAME LAW ON SEPTEMBER 1, 1963

STEPHEN E. BURGIO,
Attorney for Respondents,
Office & P. O. Address,
34-20 Broadway,
Long Island City, New York.

HARRY L. KOENIG,
Of Counsel.

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Respondents respectfully oppose the granting of the Writ of Certiorari to review the unanimous decision of the Court of Appeals of the State of New York which affirmed the unanimous decision of the Supreme Court of the State of New York, Appellate Division, First Department, which reversed an order granted by a Justice presiding at Special Term, Part I of the Supreme Court of the State of New York, County of New York, vacating the service of process upon petitioner.

The Record Below

The Appendix presented by petitioner with its petition contains no part of the record on appeal which had been certified to and examined by the Justices of the Appellate Division and the Justices of the Court of Appeals before rendering their decision; with the exception of the order and opinion at Special Term. The said record on appeal included the following papers:

1. Notice of Appeal dated December 3, 1963.
2. Order of Mr. Justice Jacob Markowitz dated November 21, 1963.
3. Notice of Motion dated October 7, 1963.
4. Affidavit of Norman Estwing sworn to October 2, 1963.
5. Affidavit of Nathan E. Zelby sworn to October 7, 1963.
6. Photo-copy of report of Hon. Thomas B. Galligan, Special Referee dated December 13, 1961.
7. Photo-copy of decision of Hon. Edgar J. Nathan, Jr., Official Referee dated April 17, 1962.
8. Photo-copy of order of Hon. Edgar J. Nathan, Jr., Official Referee dated May 16, 1962.
9. Photo-copy of plaintiffs' complaint verified September 12, 1963.
10. Affidavit of Harry L. Koenig sworn to October 15, 1963.
11. Reply affidavit of Nathan E. Zelby sworn to October 23, 1963.
12. Transcript of testimony taken before Hon. Edgar J. Nathan, Jr., on March 6, 1962.

The foregoing papers filed under Index No. 15655/63 with Clerk of Supreme Court, New York County.

13. Transcript of testimony taken before Hon. Thomas B. Galligan on November 29, 1961, filed under Index No. 4667/1961.

14. Transcript of testimony taken before Hon. Thomas B. Galligan on October 30, 1961 in the matter of Manganaro, etc., Plaintiffs vs. Estwing, etc., Defendant, filed under Index No. 3556/1961.

However, petitioner's "Appendix to Appellant's Brief" in the Court of Appeals, contains a printed copy of the foregoing record, with the exception of the transcript of testimony hereinbove shown (Items 12, 13 and 14). Respondents assume that petitioner's reference to "RA" in its "Statement" refers to its "Appendix to Appellant's Brief" in Court of Appeals. (Respondents will refer to the same pages of such appendix as RA.)

Questions Presented and Statutes Involved

Were sections 302, 10003 and 313 (service without the state giving personal jurisdiction) of the CPLR constitutionally valid as interpreted by the highest Court of the State of New York, validating the service of process upon petitioner? It is respondents' position that the language of the questions at issue presented by petitioner excludes many of the pertinent facts contained in the record herein.

Statement

The summons is dated and the complaint was verified on September 12, 1963. It was served on the president of the defendant Estwing on September 19, 1963 at Rockford, Illinois. The effective date of the CPLR was September 1, 1963. This was a new action. The old action had been

dismissed by an order of Mr. Justice Edgar J. Nathan, Jr., dated and entered May 16, 1962. The old action had been commenced before the effective date of the CPLR (RA 42-43). The complaint contains two causes of action, one in breach of warranty and the other in negligence (A, p. 17).* It alleges that on or about February 24, 1960, there was purchased for the infant plaintiff from defendant Walker, who operates Walker's Minerals at 799 Lexington Avenue, in the Borough of Manhattan, a geologist's hammer contained the words: "Unbreakable Tools Estwing Mfg. Co., Rockford, Ill." Plaintiffs are and have been residents of the County and State of New York. The infant plaintiff, then 10 years of age and his father, on April 17, 1960 were in Connecticut on a field trip collecting specimens of rock. The hammer broke while being wielded in rock breaking; causing a piece of metal from the hammer to penetrate Michael's right eye, with resultant injury to and the eventual loss of his right eye. He was hospitalized at Columbus Presbyterian Hospital, located in the County of New York and was treated by a local surgeon. The hammer in question was examined by a metallurgical expert located in the County of New York. All witnesses who could testify in support of plaintiffs' action are all located within the jurisdiction of the Supreme Court of the State of New York, County of New York (RA 43-44). It would have involved respondents in assuming a heavy financial burden to press the suit in Illinois (RA 43-44). The hammer had been manufactured in Illinois by petitioner and shipped f.o.b. Rockford, Illinois, to the New York dealer who had purchased it by direct mail order, using a catalogue which had been mailed to him by petitioner (from Mr. Justice Breitel's opinion in the Appellate Division, A, p. 17). Petitioner "does a great deal of business directly in the New York area, sending its salesmen and its catalogues into the city. . . ." (from Mr. Justice Breitel's opinion in the Appellate Division, A, p. 24).

* Petitioner's appendix designated as "A".

"The record, although conflicting in some respects, does establish certain facts as to which there is no substantial dispute—namely, that the appellant has shipped substantial quantities of its products into this State as the result of solicitation here through a local manufacturer's representative and through catalogues and advertisements and that the injury-causing hammer, purchased from a New York dealer, was one of such products." (from Mr. Justice Fuld's opinion in the Court of Appeals, A, p. 46); ". . . the cause of action asserted is clearly one 'arising from' the purposeful activities engaged in by the appellant in this State in connection with the sale of its products in the New York market" (from Mr. Justice Fuld's opinion in the Court of Appeals, A, p. 47); ". . . the infant plaintiff's injuries arose out of the particular business transaction engaged in by the nonresident manufacturer in the purposeful circulation of this hammer in the stream of commerce in New York State . . ." (from the concurring opinion of Mr. Justice Van Voorhis in the Court of Appeals, A, p. 50); ". . . the record plainly establishes not one but both bases of jurisdiction described in CPLR 302, that is, that defendant transacted business within this State within the meaning of paragraph 1 of subdivision (a), and also that he committed a tortious act within this State under paragraph 2 of subdivision (a)" (from the concurring opinion of Chief Justice Desmond in the Court of Appeals, A, p. 51).

The extent of petitioner's business operations in the New York market is fully documented and analyzed in the affidavit of Harry L. Koenig, respondents' attorney (RA 44-51). Mr. Justice Nathan's finding that petitioner "does less than 1% of its business in this state" is an obvious typewritten or mathematical error (RA 46). It is more likely that Estwing's total shipments into New York approximated over 25% of their total shipments throughout the country (RA 50-51). The extent of Est-

wing's connections with New York is further documented in the findings of Hon. Thomas B. Galligan, Special Referee (RA 23, 24 and 25).

Reasons for Denying the Writ

There is no point in laboring the fact that the Court of Appeals of the State of New York as well as the Appellate Division of the Supreme Court, First Department have decided that the process in question is valid and that New York State will entertain the suit. The well written opinions in the Appellate Courts below fully demonstrate the reasons why the Courts validated the service of process.

From Mr. Justice Fuld's opinion in the case at bar (A26-27):

> "The standard for assessing the irreducible minimum forum activities constitutionally requisite to subject foreign corporations and nonresident individuals to personal jurisdiction was reformulated in the cases of International Shoe Co. v. Washington (326 U. S. 310) and McGee v. International Life Ins. Co. (355 U. S. 220) . . ."
>
> "In place of the former rigid tests of 'residence' and 'doing business', the Supreme Court, in International Shoe, substituted the flexible requirement that a nonresident defendant, against whom a judgment in personam is sought in the forum state, be shown merely to 'have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' (326 U. S., at p. 316). And, in McGee, the court upheld the power of a state to subject a foreign corporation to suit in its courts on the basis simply of an isolated insurance contract 'which had substantial connection with that State' (355 U. S., at p. 223)."

This Court pointed out in *Hanson* v. *Denckla* (357 U. S. 235):

> ". . . It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (357 U. S., at p. 253)

Mr. Justice Breitel in the case at bar stated:

> "Of paramount importance, no doubt is the fact that an instrument dangerous to human life and health, if defective, is involved. Due process considerations would undoubtedly be more restrictive if there were involved simply a dispute of commercial dimensions between parties to a commercial contract. Where one introduces into a state a dangerous instrument the expectation of responsibilities should be greater . . ." (A25)

From Mr. Justice Fuld's opinion in the instant case:

> "We hold that the appellant's activities in this State are sufficient to satisfy the statutory criterion of transaction of business as well as the constitutional requirement of 'minimum contacts'. (See International Shoe Co. v. Washington, 326 U. S. 310, 319-320, supra; McGee v. International Ins. Co., 355 U. S. 220, 223, supra.) For the reasons we gave in rejecting a similar contention in the Longines-Wittnauer case (supra, pp. 456-458), we do not deem it determinative, as urged by the appellant, that the formal execution of its sales contracts may have occurred in Illinois rather than New York. Nor is it a controlling consideration that the actual injury happened to take place in Connecticut, since the cause of action asserted is clearly one 'arising from' the purposeful activities engaged in by the appellant in this State in connection with the sale of its products in the New York market." (A47)

From Mr. Justice Van Voorhis' concurring opinion in the instant case:

> "Since products or some related form of liability (if established) would mean that the infant plaintiff's injuries arose out of the particular business transaction engaged in by the nonresident manufacturer in the purposeful circulation of this hammer in the stream of commerce in New York State, enough has been shown prima facie to warrant upholding jurisdiction to try this issue." (A50)

From the opinion of Chief Judge Desmond, in the instant case:

> ". . . Singer's is a much stronger case than Gray for the application of such a long-arm statute since the defendant manufacturer in Gray did not directly send its product into Illinois at all . . ." (A52)

From *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, page 223:

> "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State . . . It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable . . . Often the crucial witnesses . . . will be found in the insured's locality."

From *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643, page 648:

> ". . . we rejected the contention, based on the *Benn* case among others, that a state's power to regulate

must be determined by a 'conceptualistic discussion of theories of the place of contracting or of performance.' . . . And in *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316, this Court, after reviewing past cases, concluded: 'due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' "

Page 649:

". . . In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated. Such factors have been given great weight in applying the doctrine of *forum non conveniens.* See *Gulf Oil Co.* v. *Gilbert,* 330 U. S. 501, 508. And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated.[8] The Due Process Clause does not forbid a state to protect its citizens from such injustice."

From *Watson* v. *Employers Liability Corp.,* 348 U. S. 66, page 72:

"Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana

has manifested its natural interest in the injured, by providing remedies for recovery of damages. . . . Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases. But modern transportation and business methods have made it more difficult to serve process on wrongdoers who live or do business in other states. In this case efforts to serve the Gillette Company were answered by a motion to dismiss on the ground that Gillette had no Louisiana agent on whom process could be served. If this motion is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product bought and used there. What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process."

What this Court said in the foregoing cases is applicable to the case at bar.

Distinguishing Petitioner's Cases

As to *Hanson* v. *Denckla*, 357 U. S. 235, from page 251:

"However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See International Shoe Co. v. Washington. . . .

We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of

business in that State either in person or by mail. Cf. International Shoe Co. v. Washington, 326 U. S. 310; McGee v. International Life Ins. Co., 355 U. S. 220; Travelers Health Assn. v. Virginia, 339 U. S. 643.

The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from McGee v. International Life Ins. Co., 355 U. S. 220, and the cases there cited. In McGee, the nonresident defendant solicited a reinsurance agreement with a resident of California."

Erlanger v. *Cohoes Fibre Mills* (239 F. 2d 502 [4th Cir. 1956]), is distinguished by Mr. Justice Breitel in his opinion in the instant case (A23-24). There is little analogy between Erlanger, Hanson and the case at bar.

Pendzimas v. *Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961), is clearly not in point. It was a commercial transaction involving a single sale of merchandise.

Long v. *Victor Products Corp.*, 297 F. 2nd 577 (8th Cir. 1961), is clearly not in point. The decision is based on the old concepts of defining "doing business". It did not involve the interpretation of a state statute enlarging jurisdiction such as in the instant matter.

In *Insull* v. *New York World Telegram Corp.*, 172 Fed. Supp. 615 (N. D. Ill., 1959), a libel suit, the court decided that a "foreign publishing corporation is not transacting business in a state because it ships its periodicals into the state to its subscribers . . .". This situation is clearly distinguishable from the case at bar, where the foreign corporation manuafctured a product which possessed dangerous propensities and was falsely labelled inducing its use by a resident of New York who purchased it in New York from a New York dealer, who in turn had purchased the product from defendant—resulting in serious injury to

plaintiffs. It is noteworthy that subdivision (2) of § 302 of the CPLR excludes "a cause of action for defamation of character . . .".

Kaye-Martin v. *Brooks*, 267 F. 2d 394 (7th Cir., 1959), cert. den. 361 U. S. 832, involved a commercial transaction that had absolutely no connection with the state of Illinois. From page 398:

> "On this record as it comes to us it is clear that those 'minimal contacts' which are an absolute prerequisite to personal jurisdiction of the courts of Illinois over a defendant are totally lacking as to Brooks . . ."

Groback v. *Addo Machine Corp.*, 16 Ill. 2d 426, is clearly not in point. It involved a commercial transaction between plaintiff and defendant. The Court held that defendant did not transact any business in the state. When citing *Groback*, petitioner asserts that its total shipments into New York State amounted to less than 1% of its total business. This statement is clearly erroneous. This statement in the findings of Mr. Justice Nathan was inadvertently made and is mathematically incorrect as fully established by the record.

§ 302 Is a Procedural Statute and May Be Applied Retroactively

Mr. Justice Fuld in his opinion covered the question of retroactivity (A29-31). Among other cases, he cites *McGee* v. *International Life Ins. Co.*, *supra* and the very recent case of *United States* v. *First Nat. City Bank*, 379 U. S. 378, 85 S. Ct. 528; and *Simonson* v. *International Bank*, 14 N. Y. 2d 281, 290, which was cited by this Court in *United States* v. *First Nat. City Bank*, *supra*.

Hasse v. *American Photograph Corp.*, 299 F. 2d 666 (10th Cir. 1962) and *Guerra de Chapa* v. *Allen*, 119 F. Supp. 129 (S. D. Texas 1954), cited by petitioner, in-

volved non-resident motorist statutes. The provisions of such statutes have been construed to apply to "future" situations. The motorist usually consents that a highway commissioner or someone in the state will accept service of process for him. The Courts have held that the motorist could not have consented if such a statute was not in effect at the time when the motorist was involved in the State.

Jennings v. *McCall Corporation,* 320 F. 2d 64 (8th Cir. 1963), cited by petitioner, is not in point. There the Court held that a foreign corporation was not amenable to suit in the State on a cause of action which did not arise out of any business conducted by it in the State (as interpreted under Missouri law) although "neither party seriously contends that jurisdiction is precluded in this case by federal due process requirements . . .".

Summary

From *McGee* v. *International Life Ins. Co., supra* (pp. 222-3):

> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

It is significant that petitioner has made every attempt to minimize its activities in the State of New York, on the assumption, no doubt, that if it was "active" in the State then it would be obliged to defend the instant lawsuit in the State. Can it be seriously contended that petitioner is being deprived of its "property without due process of law" when it has been given every opportunity to defend the instant lawsuit in the State where it has been actively engaged for many years in selling its products. The New York Legislature, in its wisdom, has seen fit to follow this Court in enlarging its jurisdiction against foreign corporations as provided in § 302 of the CPLR and related sections. The highest Court of the State of New York in the suit at bar has interpreted these statutes to give full force and effect to the intent of the Legislature of the State of New York and to the law as interpreted by this Court. Respondents are consumers who were seriously injured when they used one of Estwing's hammers purchased from an Estwing dealer in New York. The injured persons live in New York; all their witnesses live in New York; nevertheless, petitioner has been fighting through all the Courts of the State of New York and now up to the Supreme Court of the United States in an effort to convince—that this suit rightfully belongs in the Courts of Illinois—that he, the manufacturer, would be deprived of his property without due process of law—if he is required to defend this action in the Courts of New York. There is no logic to his contention. It would seem to the writer that it would be more logical to hold that respondents would be deprived of their property without due process of law if they are obliged to undertake and assume the financial burden of transporting themselves and their witnesses to the State of Illinois.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN E. BURGIO,
Attorney for Respondents,
Office & P. O. Address,
34-20 Broadway,
Long Island City, New York.

HARRY L. KOENIG,
Of Counsel.